

Report to

**The House of Representatives and Senate Appropriations  
Subcommittees on Justice and Public Safety**

North Carolina General Assembly

Report Prepared by

**The UNC School of Government**

Report Submitted

March 30, 2012

## Mandate from the General Assembly

The 2011 appropriations bill, S.L. 2011-145, provides in part as follows:

### STUDY FEASIBILITY OF OFFICE OF PROSECUTORIAL SERVICES

**SECTION 15.7.(a)** The School of Government at the University of North Carolina at Chapel Hill shall study the feasibility and cost of creating an Office of Prosecutorial Services within the judicial branch. The study shall compare North Carolina's judicial branch structure to that of other states in terms of organizational placement of prosecutorial and defense services within the context of the unified court system and shall also determine the necessary resources and costs required to make an Office of Prosecutorial Services viable as an independent agency under the judicial branch. The School of Government shall submit the report by April 1, 2012, to the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety.

The School of Government prepared this report in response to that mandate.

## Background

Article IV of the North Carolina Constitution describes the “judicial department.” The office of district attorney is established by section 18(1) of that article, so North Carolina’s district attorneys are a part of the judicial department, i.e., the judicial branch. The constitution does not describe the structure of the judicial branch in detail. In practice, for budgeting and administrative purposes, North Carolina’s district attorneys currently are treated as part of the Administrative Office of the Courts (AOC).

This arrangement has been criticized. For example, the Commission for the Future of Justice and the Courts in North Carolina saw an “inherent conflict” in having the AOC house “both the judges who hear disputes and the prosecutors and public defenders who represent the state and defendants in criminal cases.” The Commission recommended moving prosecutors to a “free-standing agency” within the executive branch.<sup>1</sup>

In 2000, the General Assembly created the Office of Indigent Defense Services (IDS). IDS is located “within the Judicial Department” yet is independent of the AOC.<sup>2</sup> In practice, this means that IDS submits its own budget proposals, makes its own personnel decisions, and is responsible for some of its own administrative support. This grant of autonomy to IDS brought renewed calls for similar independence for prosecutors.

In recent years, the working relationship between the AOC and the Conference of District Attorneys (the Conference), which coordinates, and provides support and assistance to, the state’s prosecutors, has

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<sup>1</sup> *Without Favor, Denial or Delay: A Court System for the 21<sup>st</sup> Century*, Commission for the Future of Justice and the Courts in North Carolina 22 (1996).

<sup>2</sup> S.L. 2000-144 § 1, codified at G.S. 7A-498.2(a).

sometimes been strained. Cataloging the reasons for that is beyond the scope of this report. However, disagreements have sometimes arisen about issues such as: (1) which items should be included in the AOC's budget requests, and which items should be prioritized in the budget process; (2) whether, and under what circumstances, individual district attorneys and the Conference should be permitted to seek grants and other outside funding; (3) which information technology projects should be prioritized by the AOC's technical personnel; and (4) how funds allocated to the AOC by the General Assembly should be disbursed and managed.

In 2009, prosecutors procured the introduction of HB 786 and SB 816, which would have created an Office of Prosecution Services (OPS) modeled on IDS. Like IDS, OPS would have been an agency in the judicial branch, but largely independent of the AOC. The bills did not advance very far in the legislative process.

In 2011, prosecutors procured the introduction of SB 478, which was similar to the legislation introduced in 2009. Subsequently, the Conference and the AOC entered into a memorandum of understanding, in which the AOC agreed to "designate an employee from the Fiscal Section of the AOC" to serve as a consultant to the Conference and to assist the Conference in gathering and interpreting budget information, and to "designate a . . . Project Manager from the Technology Services Division [of the AOC]" to consult with the Conference regarding prosecutors' technology needs and to attempt to address them. Perhaps in part because the AOC and the Conference reached that agreement, SB 478 did not progress. However, as noted above, the General Assembly did mandate that the School of Government study "the feasibility and cost of creating an Office of Prosecutorial Services within the judicial branch."

## Methodology

In keeping with the General Assembly's mandate, the School studied the organization of prosecution and defense services in North Carolina, in five other southeastern states, and in five other states across the country. The School also studied the federal court system as an additional point of reference. Generally, this involved reviewing each jurisdiction's constitution, statutes, and budget in order to understand how each system functions. The School was able to contact a prosecutor coordinator in almost every jurisdiction to confirm each state's structure. Further, one or more faculty members from the School met with:

- Peg Dorer, the Executive Director of the Conference, and several members of her staff, on December 1, 2011
- Judge John Smith, Director of the AOC, and a member of his staff, on December 20, 2011
- Danielle Carman, Assistant Director of and General Counsel to IDS, on December 19, 2011

The School followed up with the above groups as needed through email and telephone conversations. The School also reviewed relevant materials and publications, such as the report of the Futures Commission. Finally, before submitting this report to the General Assembly, the School circulated a draft to the AOC, IDS, and the Conference for review and comment. That does not imply that any of those

entities subscribe to the contents of this report; the views presented herein are those of the School alone. Faculty member Jeff Welty was primarily responsible for the School's work.

## Survey of Jurisdictions

The General Assembly instructed the School to “compare North Carolina’s judicial branch structure to that of other states in terms of organizational placement of prosecutorial and defense services within the context of the unified court system.” To satisfy this mandate, the School examined the following jurisdictions:

- North Carolina
- The federal government
- Five southeastern states: Georgia, Maryland, South Carolina, Tennessee, and Virginia
- Five states outside the southeast that are very roughly similar to North Carolina in size and population density: Kentucky, Michigan, Minnesota, Missouri, and Washington

Because some jurisdictions place prosecution and/or defense services outside the judicial branch, it was necessary to expand the scope of the study beyond “judicial branch structure.” The structure of each studied jurisdiction is set forth in detail in Appendix A. What follows is a summary of the most salient results.

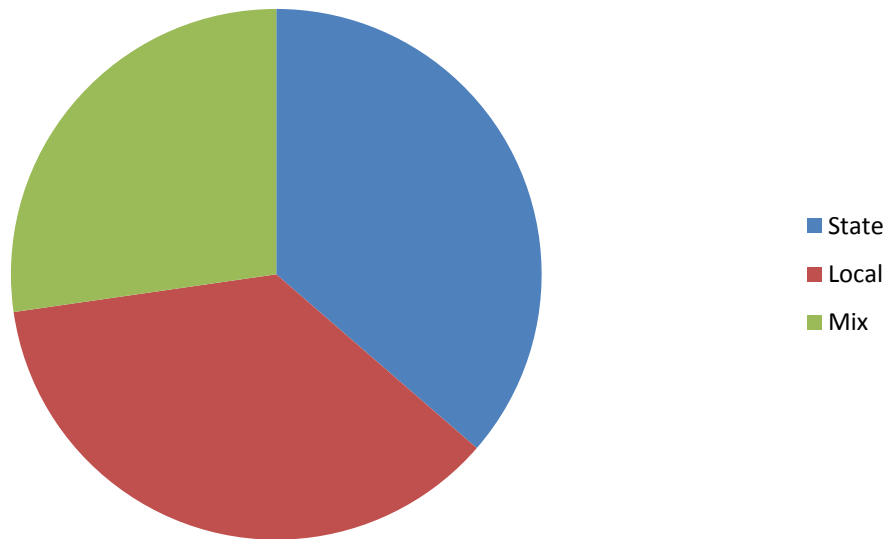
## Prosecutors

The surveyed jurisdictions vary widely in the organizational placement of prosecutors. There is no predominant or preferred practice. For present purposes, there are two principal ways in which jurisdictions differ.

- **State vs. Local.** In some jurisdictions, prosecutors are fundamentally local rather than state officials. They may be paid out of local revenues; may be given office space and administrative support by local government; and, in some cases, may be required to advise local government officials on a variety of non-criminal matters. In other jurisdictions, like North Carolina, prosecutors are state officials, though elected locally. In still other jurisdictions, prosecutors defy easy categorization, being funded by a mix of state and local revenues and discharging a mix of duties.

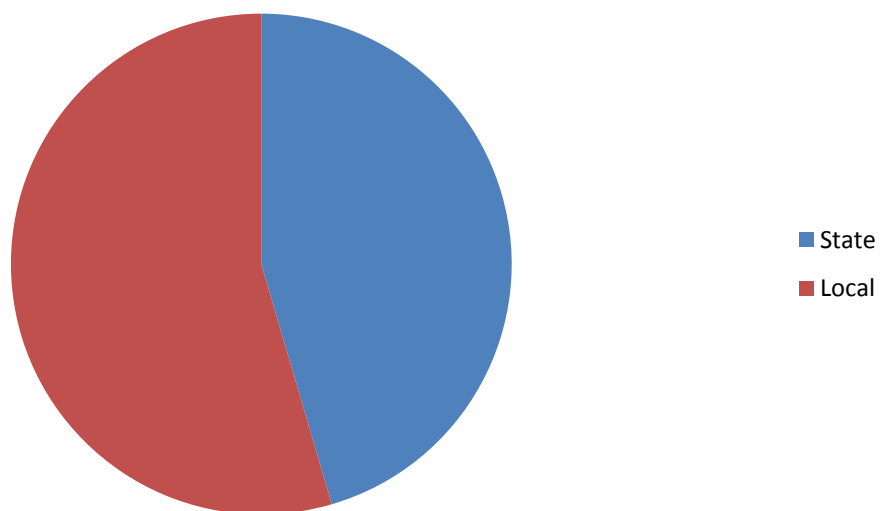
One way of classifying prosecutors is based simply on the source of their salaries. The chart below shows whether prosecutors’ salaries in the surveyed jurisdictions are paid by the state, by local governments, or by a combination of the two. It illustrates the lack of a dominant practice.

## Source of Prosecutors' Salaries



Considering factors other than salary, such as which level of government provides administrative support to prosecutors, and prosecutors' organizational placement in the state constitution and statutes, makes the picture more complicated and makes some jurisdictions extremely difficult to characterize. However, the figure below represents one possible classification of jurisdictions. Under that classification, in six of the eleven surveyed jurisdictions – excluding the federal government because it simply is not analogous – prosecutors are principally local officials. It is worth noting, however, that among southeastern states, it is more common for prosecutors to be state officials.

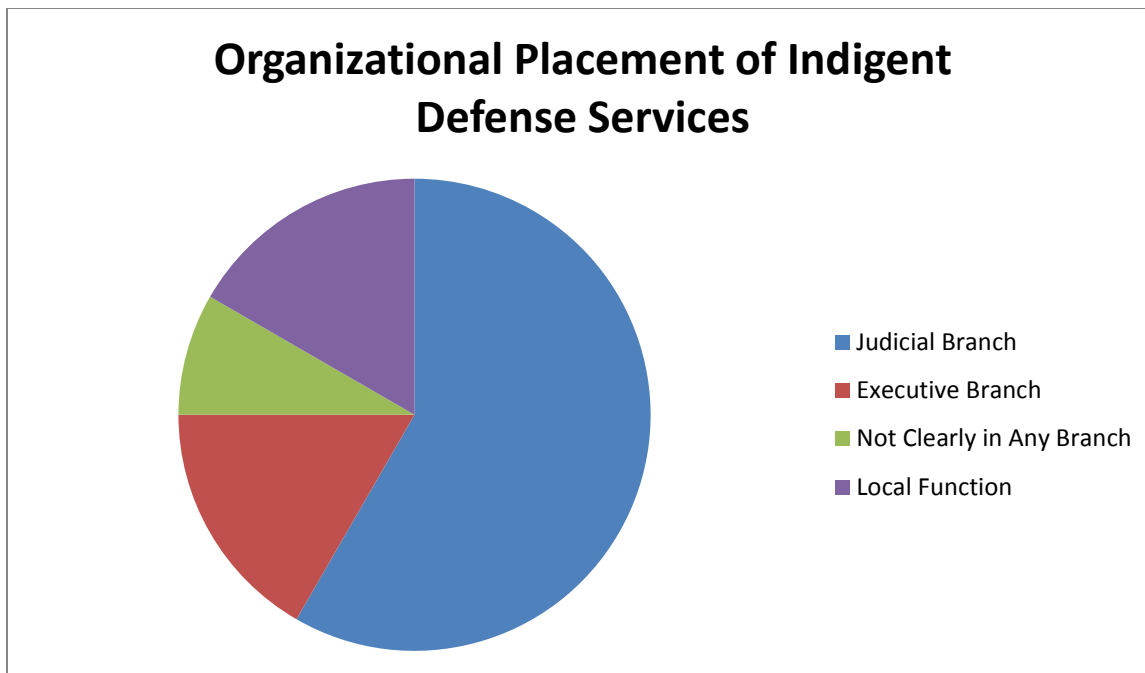
## Are Prosecutors State or Local Officials?



- **Branch Placement.** Where prosecutors are state officials, their placement within state government also varies. Among the five surveyed states in which prosecutors are state officials, three house prosecutors in the judicial branch, one places them in the executive branch, and one provides for prosecutors in a way that does not locate them clearly within either branch. The federal government also places prosecutors in the executive branch. Among the surveyed jurisdictions, only North Carolina treats prosecutors as a part of the administrative office of the courts.

## Indigent Defense

The surveyed jurisdictions also vary in the placement of indigent defense services, though as the graphic below illustrates, the most common practice is to locate indigent defense services in the judicial branch. Notably, of the seven surveyed jurisdictions that locate indigent defense services in the judicial branch, six provide such services through an independent agency similar to IDS.



## Feasibility and Costs

The General Assembly’s mandate requested information about “the feasibility and cost of creating an Office of Prosecutorial Services [as an independent agency] within the judicial branch.” It is plainly feasible: legislation has been introduced that would accomplish it, several other jurisdictions place prosecutors within the judicial branch but not within the AOC, and the creation of IDS serves as a precedent for the creation of an independent judicial branch agency in North Carolina. However, any such restructuring would involve both costs and benefits not present in the current system. This report will identify some of the major considerations, in three areas: legal, administrative, and financial.

## Legal Issues

One could contend that creating an Office of Prosecution Services would violate the state constitution, i.e., would require a constitutional amendment. Two possible arguments could be made in support of that position. The first is based in article IV, section 15 of the state constitution, which states that “[t]he General Assembly shall provide for an administrative office of the courts to carry out the provisions of this article.” One could read the use of the singular article “an” to preclude the existence of any agencies other than the AOC within the judicial branch. Alternatively, however, one could read section 15 as establishing the AOC, but not prohibiting the establishment of other agencies within the judicial branch. In fact, the General Assembly has established other agencies within the judicial branch, most notably IDS, but also including the Innocence Inquiry Commission, which was created as an “independent commission under the Judicial Department for administrative purposes.”<sup>3</sup> Given these precedents and the strong presumption of constitutionality that attaches to any act of the General Assembly,<sup>4</sup> section 15 does not appear to prohibit the establishment of an independent Office of Prosecution Services.

A second legal argument could be made based on the concept of separation of powers. Article IV, section 1 of the state constitution provides in part that “[t]he General Assembly shall have no power to deprive the judicial department of any power . . . that rightfully pertains to it.” The idea of separation of powers has also been generally endorsed by cases such as *State ex rel. Wallace v. Bone*, 304 N.C. 591 (1982) (improper for legislators to serve on executive commissions), *Advisory Opinion In re Separation of Powers*, 305 N.C. 767 (1982) (Governor’s duties as director of the budget may not be encroached upon), and *State v. Elam*, 302 N.C. 157 (1981) (the General Assembly cannot make procedural rules for the appellate division, because that authority is reserved in the state constitution for the supreme court). One could argue that if the General Assembly were to establish an independent Office of Prosecution Services, it would be meddling in the affairs of the judicial branch in a way that violates the separation of powers.

However, the separation of powers in our constitution is not absolute. The constitution gives the legislature significant control over the court system, including the power to structure the court of appeals and the trial courts, the power to dictate certain procedural rules, the power to determine judges’ salaries and to remove judges, and the like.<sup>5</sup> Similarly, article III, section 5(10) of the constitution provides that “[t]he General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State and may alter them from time to time.” The General Assembly has exercised its authority by enacting an array of statutes that affect the structure, operations, and funding of the courts. Indeed, virtually all of Chapter 7A of the General Statutes fits that description. Most significantly, the General Assembly has already created agencies other than the AOC within the judicial branch. If establishing an Office of Prosecution Services would be unconstitutional, then those acts, too, were unconstitutional. Yet a separation of powers challenge to IDS, though admittedly one slightly different than the argument described above, was rejected by the court of appeals in *Ivarsson v. Office of Indigent Defense Services*, 156 N.C. App. 628 (2003) (holding that the

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<sup>3</sup> G.S. 15A-1462.

<sup>4</sup> See, e.g., *Pender County v. Bartlett*, 361 N.C. 491 (2007).

<sup>5</sup> See generally N.C. Const. art. IV.

appointment of counsel is not the exclusive province of the judiciary). Given the language of the state constitution, the legislature's history of taking action that impacts the judicial branch, and the presumption of constitutionality that attaches to legislative enactments, it is unlikely that the separation of powers would preclude the establishment of an Office of Prosecution Services under the current state constitution.

Although the two arguments discussed above are unlikely to prevail, it is still possible that the creation of an independent Office of Prosecution Services would be challenged in court. The expense and uncertainty of any such litigation must be viewed as a possible cost associated with restructuring.

## Administrative Issues

Any separation of the district attorneys from the AOC would create a number of practical concerns. Among these concerns are the following:

- **Support Services.** It would be necessary to determine whether OPS would provide its own support services, whether it would rely on the AOC for such services, or some combination of the two. Each solution presents its own difficulties. The relationship between IDS and the AOC illustrates the difficulty of having the AOC provide continued support. Both IDS and the AOC are clearly working in good faith, yet neither party is fully satisfied with the arrangement. The AOC is unhappy with being required to support IDS without having any control over IDS's actions. For example, it must support IDS's purchasing decisions without having any ability to limit or manage IDS's purchasing. On the other hand, IDS believes that the AOC should allow IDS more input into the scope of the support that the AOC will provide, and into the selection of vendors, products, and support processes. If the AOC were to support OPS, the same frictions would likely exist. Having OPS provide its own support services might avoid these frictions in the long run. However, in the short run, it would create additional problems. For example, if OPS were to provide its own support services, OPS and the AOC would need to determine, and might disagree about, how many AOC support positions should be moved to OPS. There might also be a loss of economies of scale in support services, an issue discussed below.
- **Information Technology.** It would be necessary to resolve several information technology issues. The AOC currently provides and maintains several computer programs that are important to prosecutors, such as a case management program known as CCIS-DA and a software product called DAS that is used for collecting police reports and other information about criminal cases and providing the information to the defense during the discovery process. Some of these programs, such as DAS, are freestanding and could be transferred to OPS, perhaps with some associated information technology positions. Others, like CCIS-DA, are used by multiple actors in the court system, are integrated with other services and likely could not be transferred. (CCIS-DA is integrated with the clerks' case management and record-keeping programs.) These issues are not necessarily intractable. For example, the district attorneys could pay the AOC for continued access to CCIS-DA. However, the details of the solutions could be complicated.



- **Allocated Funds.** It would be necessary to determine how some previously allocated funds would be divided. Funds allocated to the AOC for supplies, technology, and the like are not currently earmarked for any particular group within the AOC. If OPS were to be created, there could be a disagreement about what fraction of the funds in question should be transferred to OPS. In the long run, each agency would submit its own budget requests and would receive and manage its own allocation, so this issue should not persist, but it could be contentious in the short run.

## Financial Issues

Addressing the legal and administrative issues noted above could be time-consuming and might be costly in the short run. In the long run, the principal financial concern is the possible loss of economies of scale in administrative support services. For example, if OPS were to provide its own support services, it would need to have a human resources department. AOC, of course, would continue to need its own human resources department. AOC's human resources department would be smaller than it is now because it would not have to handle the human resources issues that arise in connection with district attorneys and their staffs. However, human resources staffing levels in other jurisdictions suggest that the combined size of the two human resources departments would need to be larger than the AOC's current human resources department due to a loss of economies of scale.<sup>6</sup> Similar points could be made about other support services, such as purchasing and information technology training and support. A historical example illustrates the potential loss of economies of scale. Effective July 1, 2006, IDS assumed responsibility for processing and paying fee applications submitted by private attorneys who handled indigent defense cases, a function previously performed by the AOC. The AOC transferred three accounts payable positions to IDS,<sup>7</sup> but IDS added an additional position,<sup>8</sup> meaning that the total number of support positions increased slightly across the two agencies. It should be noted that IDS has found the added expense warranted by the increased level of service that it is able to provide in processing fee applications, in terms of accuracy and timeliness.

It is impossible to predict precisely the cost of creating an independent OPS, in part because the answer depends on the degree of independence the OPS is given. A completely separate agency might cost more than an agency that, like IDS, is separate in some ways but that relies on the AOC for administrative support services. Regardless of the specific structure chosen for an independent OPS, it is likely that there would be some cost, both in the short run as the split is effectuated and one-time problems associated with the split are addressed, and in the long run due to lost economies of scale. A

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<sup>6</sup> The AOC projects that if an OPS were created, the AOC would be able to transfer two human resources positions to OPS. There are currently 1,223.3 prosecutorial employees in North Carolina. (This figure includes 99.5 grant-funded employees, most or all of whom must be processed by the state's human resources staff.) Two human resources staff would result in a 612:1 ratio of prosecutorial personnel to human resources staff. However, among jurisdictions in which prosecutors provide their own human resources function, the ratio ranges from 261:1 in Tennessee, to 300:1 in Georgia, to 575:1 in Kentucky. Thus, the experience in other jurisdictions suggests that three human resources staff might be necessary in North Carolina, which would result in a 408:1 ratio.

<sup>7</sup> Email from Gregg Stahl, Senior Deputy Director, Administrative Office of the Courts (Mar. 9, 2012).

<sup>8</sup> Email from Elisa Wolper, Chief Financial Officer, Office of Indigent Defense Services (Mar. 8, 2012).

rough estimate of the long-run cost, based partly on IDS's experience assuming the accounts payable function, partly on other states' experiences, and partly on estimates from informed sources, is that between two and five additional positions would need to be created. Comparing that cost to the overall size of the judicial branch provides some perspective: the AOC currently encompasses 5,905 positions, and has a FY 2011 budget of \$439 million.<sup>9</sup> The cost might be justified by expected improvements in the quality of services provided and by reduced friction between prosecutors and the AOC.

## **Conclusion**

Having the district attorneys fall under the AOC umbrella for administrative purposes is a practice of long standing that appears to be unique to North Carolina. Creating an Office of Prosecution Services has the potential to solve some of the problems inherent to that structure, but it would create some difficulties in the short run and likely would result in modest financial costs in the long run.

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<sup>9</sup> Email from John Poteat, Fiscal Analyst, Fiscal Research Division of the N.C. General Assembly (Mar. 23, 2012).

## Appendix A: Survey of Jurisdictions

### North Carolina

#### Prosecution

*North Carolina prosecutors are part of the judicial branch, and function for budgeting and administrative purposes as part of the Administrative Office of the Courts.*

North Carolina prosecutors are part of the judicial branch. Article IV of the North Carolina Constitution, titled “Judicial,” creates the “judicial department,” i.e., the judicial branch of state government. Section 18 of that article provides for the office of District Attorney. Additional details about district attorneys, such as the number and boundaries of the prosecutorial districts, the duties of district attorneys, and the like, are set forth in Article 9 of Chapter 7A of the General Statutes, which is titled “Judicial Department.” The appellate courts have recognized that district attorneys are part of the judicial branch.<sup>10</sup>

In the budgeting process, too, prosecutors are treated as part of the judicial branch,<sup>11</sup> and are paid from state funds. The General Assembly decides how many assistant district attorneys each elected district attorney shall have.<sup>12</sup> It also sets the salaries of elected district attorneys and their assistants.<sup>13</sup> The legislature has established a specific salary for elected district attorneys.<sup>14</sup> For assistants, it has mandated a minimum salary, and an average salary per office, with individual salaries within each office otherwise established by the elected district attorney with the approval of the Administrative Office of the Courts (AOC).<sup>15</sup>

Besides its role in approving the salaries of assistant district attorneys, the AOC has additional authority over prosecutors and their offices. For example, the General Assembly recently directed the AOC to reduce the number of support staff in the district attorneys’ offices.<sup>16</sup> The AOC also makes decisions regarding purchasing, technology, and other matters that affect prosecutors.

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<sup>10</sup> See, e.g., *State v. Friend*, No. COA11-572, 2012 WL 695996, at \*2 (N.C. Ct. App. Mar. 6, 2012) (noting that “the district attorney is a judicial or quasi-judicial officer”).

<sup>11</sup> S.L. 2011-145 § 29.4(a) (setting the salaries of certain “judicial branch officials,” including district attorneys).

<sup>12</sup> G.S. 7A-60(a1).

<sup>13</sup> G.S. 7A-65(a).

<sup>14</sup> The current salary is \$119,305, see S.L. 2011-145 § 29.4(a), plus longevity pay as described in G.S. 7A-65.

<sup>15</sup> Jeff Welty, *Prosecutors’ Pay*, N.C. Criminal Law Blog (UNC School of Government, Aug. 2, 2010), <http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1460>.

<sup>16</sup> Senate Appropriations Committee, Report on the Continuation, Expansion and Capital Budgets, page 104 (May 24, 2011), available at [http://www.ncleg.net/DocumentSites/Committees/SenateAppropriationsBaseBudget/2011%20Long%20session/2011-05-24/2011-05-24\\_Senate\\_Committee\\_Report\\_Web.pdf](http://www.ncleg.net/DocumentSites/Committees/SenateAppropriationsBaseBudget/2011%20Long%20session/2011-05-24/2011-05-24_Senate_Committee_Report_Web.pdf).

North Carolina prosecutors are loosely organized through the Conference of District Attorneys, a body created by statute to coordinate among the district attorneys and to assist them with the administration of their offices.<sup>17</sup> The Conference does not have supervisory authority over the district attorneys.

## Defense

*Indigent defense services in North Carolina are provided by the Office of Indigent Defense Services, an independent agency within the judicial branch.*

In 2000, the General Assembly created the Office of Indigent Defense Services (IDS), an agency “within the Judicial Department.”<sup>18</sup> Its budget is “part of the Judicial Department’s budget.”<sup>19</sup> The AOC is required to provide administrative support to IDS.<sup>20</sup> However, IDS has substantial autonomy: it operates “independently of the head of the [AOC],”<sup>21</sup> and though required to consult with the AOC regarding budget issues, IDS has “final authority” over its own budget requests.<sup>22</sup> The AOC may not reduce or modify IDS’s budget without IDS’s consent.<sup>23</sup>

## Federal Prosecution

*Federal prosecutors are part of the executive branch.*

There is a United States Attorney for each federal judicial district. The United States Attorneys’ Offices are part of the U.S. Department of Justice,<sup>24</sup> which in turn is part of the executive branch. The Department of Justice also contains an Executive Office for United States Attorneys, the purpose of which is to support the United States Attorneys – for example, by providing educational conferences and publishing a manual – to evaluate them, and to provide a liaison between them and other agencies within the Department.<sup>25</sup> The Department also handles certain types of prosecutions from its Criminal Division, headquartered in Washington, D.C., particularly terrorism, public integrity, and human rights cases.<sup>26</sup>

## Defense

*Indigent defense services in the federal courts are provided by the judicial branch, typically through public defender offices that have partial autonomy from the rest of the branch.*

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<sup>17</sup> G.S. 7A-411.

<sup>18</sup> G.S. 7A-498.2(a).

<sup>19</sup> G.S. 7A-498.2(d).

<sup>20</sup> G.S. 7A-498.2(c).

<sup>21</sup> G.S. 7A-498.2(b).

<sup>22</sup> G.S. 7A-498.2(d).

<sup>23</sup> G.S. 7A-498.2(e).

<sup>24</sup> U.S. Department of Justice organization chart, <http://www.justice.gov/agencies/index-org.html>.

<sup>25</sup> Executive Office for United States Attorneys organization chart and Overview, <http://www.justice.gov/jmd/mps/manual/eousa.htm>.

<sup>26</sup> Criminal Division organization chart and Overview, <http://www.justice.gov/jmd/mps/manual/crm.htm>.

The Criminal Justice Act<sup>27</sup> requires that each U.S. district court implement a plan for providing indigent defense services. Any district with at least 200 indigent defendants per year is permitted to establish a public defender or community defender office, and virtually all districts have done so.<sup>28</sup> The difference between a public defender and a community defender is described in 18 U.S.C. § 3006A(g). Generally, public defenders are appointed by the court of appeals for the appropriate circuit, may be removed by the same court, and are subject to the budgeting authority of the Administrative Office of the Courts. Community defenders are nonprofit corporations authorized by the district court's Criminal Justice Act plan to provide defense services, and are funded by grants authorized by the Judicial Conference of the United States. Thus, both public and community defenders are part of the judicial branch, but operate without much centralized control or day-to-day supervision.

## Southeastern States

### Georgia Prosecution

*Georgia prosecutors are state officials within the judicial branch. Administratively, they are not part of the court system, but rather are organized under their own umbrella group, the Prosecuting Attorneys' Council of Georgia.*

The principal prosecutors in Georgia are called district attorneys. There is one district attorney for each judicial circuit, and there are 49 circuits encompassing a total of 159 counties.<sup>29</sup> (There are also solicitors general who handle some misdemeanor and infraction cases, but there are fewer than 20 full time solicitors general, and some parts of the state do without them entirely, so this survey focuses on district attorneys.<sup>30</sup>) Article VI of the state constitution is entitled "Judicial Branch," and section VIII of that article is entitled "District Attorneys," indicating that Georgia prosecutors are state officers that fall under the judicial branch. By statute also, "[a]ll state paid personnel employed by the district attorneys . . . shall be employees of the judicial branch of state government."<sup>31</sup>

District attorneys are funded by a mix of state and local revenues.<sup>32</sup> The state pays the salaries of the elected district attorney and a number of assistants and support staff determined by a formula. Counties are free to supplement that appropriation, and many do so, to varying degrees. The net effect is that

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<sup>27</sup> 18 U.S.C. § 3006A.

<sup>28</sup> There are 94 federal judicial districts. See U.S. Courts: Federal Judges, Frequently Asked Questions, <http://www.uscourts.gov/Common/FAQS.aspx>. At least 89 of them have established a public or community defender office. See Federal Public & Community Defender Directory, [http://fd.org/pdf\\_lib/defenderdir.pdf](http://fd.org/pdf_lib/defenderdir.pdf).

<sup>29</sup> Telephone conversation with Stan Gunter, Executive Director, Prosecuting Attorneys' Council of Georgia (Mar. 27, 2012).

<sup>30</sup> *Id.*

<sup>31</sup> Ga. Code § 15-18-19.

<sup>32</sup> Ga. Const. art. VI, § VIII, ¶ I(c) (stating that district attorneys may receive "local supplements to their compensation"). See also Ga. Code § 15-18-10; Ga. Code § 15-18-19.

state funding predominates in rural areas, while wealthier urban areas are principally funded at the county level.<sup>33</sup>

Georgia prosecutors are organized under the banner of the Prosecuting Attorneys' Council of Georgia,<sup>34</sup> a state-funded agency that was created by Ga. Code § 15-18-40. The Council is the "fiscal officer for the prosecuting attorneys and shall prepare and submit budget estimates of state appropriations necessary for the maintenance and operation of the district attorneys' . . . offices."<sup>35</sup> Once state appropriations are made, the Council actually receives and disburses the funds.<sup>36</sup> The district attorneys and the Council are treated, for budget purposes, as independent of the rest of the court system.<sup>37</sup> The Council also provides human resources, purchasing, information technology, and other administrative support, as well as training, to the prosecutors.<sup>38</sup> At one time, the AOC provided some administrative support to the Council and to prosecutors, but the last vestige of that – the payroll function – was transferred from the AOC to the Council five or more years ago.<sup>39</sup>

## Defense

*Indigent defense in Georgia is provided through the Georgia Public Defender Standards Council, an agency in the executive branch.*

Since 2003, the Georgia Public Defender Standards Council,<sup>40</sup> created by statute,<sup>41</sup> has administered the indigent defense system in Georgia. The Council is "an independent agency within the executive branch of the state government."<sup>42</sup> The director is appointed by the governor.<sup>43</sup> The Council is the fiscal officer for all of the state's public defender offices.<sup>44</sup> The legislature appropriates funding directly to the Council.<sup>45</sup>

## Maryland Prosecution

*Prosecutors in Maryland are fundamentally county officials, paid for and supported by local governments.*

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<sup>33</sup> Telephone conversation with Gunter, *supra* note 29.

<sup>34</sup> Prosecuting Attorneys' Council of Georgia Website, <http://www.pacga.org/>.

<sup>35</sup> Ga. Code § 15-18-40(c)(1).

<sup>36</sup> Ga. Code § 15-18-19(e)(5) ("The compensation of [prosecutors and their staffs] shall be paid . . . by the Prosecuting Attorneys' Council . . .").

<sup>37</sup> Office of Planning and Budget, Amended FY 2011 and FY 2012 Budget in Brief, *available at* <http://www.open.georgia.gov/reports/BudgetInBrief.pdf>.

<sup>38</sup> Telephone conversation with Gunter, *supra* note 29.

<sup>39</sup> Telephone conversation with Gunter, *supra* note 29.

<sup>40</sup> Georgia Public Defender Standards Council Website, <http://www.gpdsc.org/>.

<sup>41</sup> Ga. Code § 17-12-1.

<sup>42</sup> Georgia Public Defender Standards Council, Mission Statement, [http://www.gpdsc.org/?page\\_id=586](http://www.gpdsc.org/?page_id=586).

<sup>43</sup> Ga. Code § 17-12-5(a).

<sup>44</sup> Ga. Code § 17-12-6(b)(1).

<sup>45</sup> Office of Planning and Budget, Amended FY 2011 and FY 2012 Budget in Brief, page 217, *available at* <http://www.open.georgia.gov/reports/BudgetInBrief.pdf>.

Articles II, III, and IV of the Maryland Constitution are entitled “Executive Department,” “Legislative Department,” and “Judiciary Department,” respectively. Prosecutors are provided for in article V, entitled “Attorney-General and State’s Attorneys.” Generally, the constitution provides for an elected State’s Attorney for each of the state’s 23 counties, plus one for the City of Baltimore. (Baltimore functions like a separate county in the system described below.) State’s Attorneys handle virtually all criminal cases in the state at the trial level. Some low-level infractions and regulatory offenses are handled by the county attorneys. The attorney general’s office represents the state in criminal appeals.

Section 9 of article V of the state constitution provides that “[t]he State’s Attorney shall perform such duties and receive such salary as shall be prescribed by the General Assembly.” However, under Md. Code, Crim. Proc. § 15-401, the salary of each State’s Attorney is set, and paid, by his or her county. In practice, these provisions are reconciled by having each county establish and pay the salary of the State’s Attorney, subject to the approval of the legislature.<sup>46</sup> This method explains the existence of statutory salary provisions for each individual county: section 15-402 concerns Allegany County, section 15-403 concerns Anne Arundel County, and so on. Many of the provisions establish specific salaries, while a few simply provide that the elected prosecutor’s salary shall be set by the county.

The county also provides for and pays any assistant prosecutors and support staff.<sup>47</sup> Accordingly, the State’s Attorneys do not appear in the state budget.<sup>48</sup> However, Md. Code, Crim. Proc. § 15-201 et seq. establishes the State’s Attorneys’ Coordination Council,<sup>49</sup> which, through a State’s Attorneys’ Coordinator, provides training and technical assistance to the state’s prosecutors. The permanent staff of the office is small – the Coordinator and two non-lawyer support staff.<sup>50</sup> The office is funded by an annual grant from the governor’s office of crime control.<sup>51</sup>

## Defense

*Indigent defense in Maryland is provided by a single, state-wide public defender system, which is part of the executive branch.*

Indigent defense in Maryland is provided through the Office of the Public Defender, a state-wide public defender system that was created and is defined by Title 16 of the Maryland Code of Criminal Procedure.<sup>52</sup> A board of directors appoints the public defender to a six-year term.<sup>53</sup> The agency is

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<sup>46</sup> Telephone conversation with Steven Kroll, State’s Attorneys’ Coordinator, State’s Attorneys’ Association (Mar. 21, 2012).

<sup>47</sup> *Id.*

<sup>48</sup> Maryland Department of Budget and Management, FY 2012 Maryland Budget Highlights, *available at* <http://www.dbm.maryland.gov/agencies/operbudget/Documents/2012/FY2012BudgetHighlights.pdf>.

<sup>49</sup> For more information, see Maryland State’s Attorneys’ Association Website, <http://www.mdsaa.org/>, and State’s Attorneys’ Coordination Council Website, <http://www.msa.md.gov/msa/mdmanual/26excom/html/33statt.html>.

<sup>50</sup> Telephone conversation with Kroll, *supra* note 46.

<sup>51</sup> Telephone conversation with Kroll, *supra* note 46.

<sup>52</sup> The 2010 annual report for the Maryland Office of the Public Defender is here: <http://www.opd.state.md.us/Index%20Assets/Annual%20Report%20FY2010%20fnldr5.pdf>.

<sup>53</sup> Md. Code, Crim. Proc. § 16-203.

located within the executive branch.<sup>54</sup> However, the agency's website<sup>55</sup> indicates that it is an "independent [s]tate [a]gency," and the state budget treats the Office of the Public Defender as a stand-alone agency.<sup>56</sup>

## **South Carolina**

### **Prosecution**

*South Carolina prosecutors are principally state officials, though funded by a mix of state and local revenues. They do not fall within any of the three branches of state government.*

The principal prosecutors in South Carolina are called "solicitors." They have no civil duties and prosecute all serious criminal cases. (Minor criminal cases arising within city limits are prosecuted in municipal court by city attorneys, while minor cases arising in unincorporated areas are prosecuted by officers in summary court.)<sup>57</sup>

Article V of the South Carolina Constitution is entitled "the Judicial Department." Section 24 of that article provides that "[t]here shall be . . . in each judicial circuit a solicitor . . . elected by the electors thereof [for a four-year term]. . . . The General Assembly shall provide by law for their duties and compensation." This suggests that the solicitors are part of the judicial branch. However, nothing in the state's statutes or budgetary or administrative structure is consistent with that idea. Further, the same section of the constitution states that "[t]he Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record." Statutory law also makes the solicitors subservient to the Attorney General to some extent. For example, S.C. Code § 1-7-320 states that solicitors "shall perform the duty of the Attorney General" when requested; S.C. Code § 1-7-100 authorizes the Attorney General to assume responsibility for any prosecution in the interest of justice, and directs the Attorney General to advise solicitors in their official duties. The Attorney General is an independent constitutional officer who is not part of the judicial branch or the executive branch.<sup>58</sup> The Attorney General is not part of the executive cabinet.<sup>59</sup>

While this connection to the Attorney General tends to refute the idea that solicitors are judicial branch officials, it does not mean that solicitors are part of the Attorney General's structure. In practice, the Attorney General does not supervise the solicitors closely.<sup>60</sup> Solicitors are organized and funded principally through the South Carolina Commission on Prosecution Coordination, a completely

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<sup>54</sup> Md. Code, Crim. Proc. § 16-202 ("There is an Office of the Public Defender in the Executive Branch of State government.").

<sup>55</sup> Maryland Office of the Public Defender Website, <http://www.opd.state.md.us/>.

<sup>56</sup> Maryland Department of Budget and Management, FY 2012 Maryland Budget Highlights, available at <http://www.dbm.maryland.gov/agencies/operbudget/Documents/2012/FY2012BudgetHighlights.pdf> (see page 77 of PDF, showing a budget of \$86 million for 904 employees).

<sup>57</sup> Telephone conversation with David Ross, Executive Director, Commission on Prosecution Coordination (Mar. 21, 2012).

<sup>58</sup> S.C. Const. art. VI, § 7 (establishing the offices of Attorney General, Treasurer, etc., none of which are clearly placed within any branch of government).

<sup>59</sup> List of South Carolina Cabinet Agencies, <http://governor.sc.gov/Pages/Cabinet.aspx>.

<sup>60</sup> Telephone conversation with Ross, *supra* note 57.



independent state agency established by S.C. Code § 1-7-910 et seq. The Commission provides training and some administrative services for prosecutors as well as playing the fiscal role detailed below.

The elected solicitors are paid by the state, as is one administrative assistant in each office.<sup>61</sup> Assistant prosecutors and administrative staff are paid in part by the state and in part by counties.<sup>62</sup> Counties also typically provide administrative support services such as human resources, information technology, and purchasing.<sup>63</sup> The solicitors' budget requests to the legislature are prepared and presented by the Commission, and state allocations flow through the Commission.<sup>64</sup>

## Defense

*Indigent defense services are provided in South Carolina through an independent agency that does not fall within any of the three branches of state government.*

Indigent defense services are coordinated by the Commission on Indigent Defense, created by S.C. Code § 17-3-310, through the Office of Indigent Defense, created by S.C. Code § 17-3-320. The Commission is an independent agency for budget purposes.<sup>65</sup> It does not appear to fall within any of the three principal branches of government. The Office actually administers the money appropriated for indigent defense, including the money allocated for public defenders.<sup>66</sup> There is a public defender for each circuit, selected by a panel comprised of local lawyers.<sup>67</sup>

## Tennessee Prosecution

*Tennessee prosecutors are state officials and part of the judicial branch. A prosecutors' conference handles budgetary and administrative matters for all prosecutors' offices.*

Prosecutors are part of the judicial branch of state government in Tennessee. Article VI of the Tennessee Constitution is entitled "Judicial Department." Section 5 of that article, "Attorney general; state reporter; district attorneys," provides for an elected "Attorney for the State" for each circuit or district. Chapter 7 ("District Attorneys General") of Title 8 ("Public Officers and Employees")<sup>68</sup> of the Tennessee Code further details the nature of Tennessee's prosecutors. The salaries of District Attorneys General

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<sup>61</sup> Telephone conversation with Ross, *supra* note 57.

<sup>62</sup> Telephone conversation with Ross, *supra* note 57. *See also* S.C. Code § 1-7-490 (designating the source of various assistants' salaries, including several to be paid by counties).

<sup>63</sup> Telephone conversation with Ross, *supra* note 57.

<sup>64</sup> S.C. 2011-2012 General Appropriations Bill (H 3700) § 46, [http://www.scstatehouse.gov/sess119\\_2011-2012/appropriations2011/ta11ndx.htm](http://www.scstatehouse.gov/sess119_2011-2012/appropriations2011/ta11ndx.htm); *see also* S.C. Code § 1-7-940(A)(2) (requiring the Commission to submit the solicitors' budgets to the General Assembly).

<sup>65</sup> S.C. 2011-2012 General Appropriations for Commission on Indigent Defense (H 3700), [http://www.scstatehouse.gov/sess119\\_2011-2012/appropriations2011/tas47.htm](http://www.scstatehouse.gov/sess119_2011-2012/appropriations2011/tas47.htm).

<sup>66</sup> S.C. Code § 17-3-330(A)(1).

<sup>67</sup> S.C. Code § 17-3-510.

<sup>68</sup> Note that the statutory provisions concerning prosecutors are not located in Title 16 ("Courts") or Title 17 ("Judges and Chancellors") of the Tennessee Code.

and their assistants are set by statute.<sup>69</sup> The District Attorneys General Conference, created by Tenn. Code § 8-7-301 et seq., includes an executive director, elected by the District Attorneys General and paid a salary provided by statute.<sup>70</sup>

The state budget reflects the placement of prosecutors within the judicial branch.<sup>71</sup> In the budgeting process, Tennessee prosecutors are independent of the Administrative Office of the Courts and other judicial branch agencies.<sup>72</sup> The executive director of the Conference is entitled to a budget officer among other necessary assistants,<sup>73</sup> and is required to submit budget requests for the offices of district attorneys general to the legislature.<sup>74</sup> Funding for the various offices of the District Attorneys General is appropriated based on that request,<sup>75</sup> and once allocated, funds are transferred to the Conference for further distribution to the prosecutors' offices.

The Conference also provides administrative support services, such as human resources and information technology services, to prosecutors' offices.<sup>76</sup>

## Defense

*Indigent defense in Tennessee is provided principally by state-funded public defender offices, which are part of the judicial branch. A public defenders' conference handles budgetary and administrative matters for all public defenders' offices.*

The state budget<sup>77</sup> describes the judicial branch as consisting of several agencies, including the District Public Defenders Conference. Chapter 14 ("Public Defenders") of Title 8 ("Public Officers and Employees") of the Tennessee Code creates a public defender office for each district,<sup>78</sup> except for two districts in which local public defender offices apparently already existed.<sup>79</sup> State law also creates a District Public Defenders Conference,<sup>80</sup> which appears to be similar to the prosecutors' conference. The

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<sup>69</sup> Tenn. Code § 8-7-105 (elected district attorneys general); Tenn. Code § 8-7-201 et seq. (assistant district attorneys general).

<sup>70</sup> Tenn. Code § 8-7-308.

<sup>71</sup> State of Tennessee 2011-2012 Budget, page B-215, available at <http://www.tn.gov/finance/bud/documents/11-12BudgetVol1.pdf>.

<sup>72</sup> Telephone conversation with Wally Kirby, Executive Director, District Attorneys General Conference (Mar. 20, 2012).

<sup>73</sup> Tenn. Code § 8-7-311.

<sup>74</sup> Tenn. Code § 8-7-309(a)(5).

<sup>75</sup> State of Tennessee 2011-2012 Budget, page B-217, available at <http://www.tn.gov/finance/bud/documents/11-12BudgetVol1.pdf> (providing for a budget of \$96 million for the prosecutors' conference and \$42 million for the public defenders' conference, without further detail regarding individual offices).

<sup>76</sup> Telephone conversation with Kirby, *supra* note 72. The Conference has a total of 28 employees, with three in human resources and eight in information technology, serving 31 elected prosecutors, about 400 assistants, and about 325 support staff.

<sup>77</sup> State of Tennessee 2011-2012 Budget, page B-215, available at <http://www.tn.gov/finance/bud/documents/11-12BudgetVol1.pdf>.

<sup>78</sup> Tenn. Code § 8-14-201 et seq.

<sup>79</sup> Tenn. Code § 8-14-210 (appropriating funds for the public defender offices in the 20th and 30th judicial districts).

<sup>80</sup> Tenn. Code § 8-14-301.

statutes contain similar provisions for an executive director of the conference and for support staff. When the public defender offices are conflicted out of a case, the Administrative Office of the Courts pays for private appointed counsel.<sup>81</sup>

## **Virginia**

### **Prosecution**

*Although funded principally by state appropriations, Virginia prosecutors are best described as local government officials. They do have a training and support agency within the executive branch of state government.*

Prosecutors are not mentioned in the articles of the Virginia Constitution that define the legislative, executive, and judicial branches of state government.<sup>82</sup> Instead, section 4 (“County and City Officers”) of article VII (“Local Government”) of the constitution provides that “[t]here shall be elected by the qualified voters of each county and city a treasurer, a sheriff, an attorney for the Commonwealth, a clerk . . . and a commissioner of revenue. The duties and compensation of such officers shall be prescribed by general law or special act.” By statute, “[t]he attorney for the Commonwealth and assistant attorney for the Commonwealth shall be a part of the department of law enforcement of the county or city in which he is elected or appointed . . . .”<sup>83</sup> Although the state constitution and statutes categorize Virginia’s prosecutors as local officials, from an administrative standpoint, the elected Commonwealth’s Attorneys are state employees. Their salaries are paid entirely by the state, and they are eligible for state employee benefits.<sup>84</sup>

Beyond the elected attorneys’ salaries, funding for prosecutors’ offices more generally comes primarily through “a single-item lump sum [appropriation by the legislature] to the Compensation Board for later distribution among Commonwealth’s Attorneys offices following an established formula,” with some additional funding coming from local government.<sup>85</sup> Local governments also generally provide office space and support functions such as human resources, purchasing, and information technology.<sup>86</sup> Assistant prosecutors and support staff are classified administratively as local employees.<sup>87</sup>

Virginia’s statutes provide for a “Commonwealth Attorneys Services Council” to be established “in the executive branch of state government.”<sup>88</sup> The purpose of the Council is to provide “training, education

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<sup>81</sup> Telephone conversation with Kirby, *supra* note 72.

<sup>82</sup> Va. Const. articles IV, V, and VI, respectively.

<sup>83</sup> Va. Code § 15.2-1627(b).

<sup>84</sup> Telephone conversation with Bob Harris, Director, Commonwealth’s Attorneys’ Services Council (Mar. 21, 2012).

<sup>85</sup> Commonwealth’s Attorneys Budget Issues, Testimony before the Senate Finance General Government Subcommittee, page 2 (Jan. 26, 2010), *available at* <http://sfc.virginia.gov/pdf/General%20Gov/2010%20Session/012610%20No3%20Commonwealth%27s%20Attorneys.pdf>.

<sup>86</sup> Telephone conversation with Harris, *supra* note 84.

<sup>87</sup> Telephone conversation with Harris, *supra* note 84.

<sup>88</sup> Va. Code § 2.2-2617.

and services for attorneys for the Commonwealth.”<sup>89</sup> The Council is state funded, and falls within the Office of Public Safety, which is the equivalent of a North Carolina executive department.<sup>90</sup>

## Defense

*Indigent defense in Virginia is coordinated by a commission that is similar to IDS. For budget purposes, the commission is part of the judicial branch, though it appears to operate autonomously.*

The Virginia Indigent Defense Commission, established by statute,<sup>91</sup> maintains and oversees the state’s public defender offices; sets the standards for and maintains the lists of attorneys eligible for court appointment; handles requests for appropriations; and otherwise coordinates indigent defense in the state.<sup>92</sup> The Commission is classified as a judicial agency for budget purposes,<sup>93</sup> though the members of the Commission come from all three branches of government.<sup>94</sup> The Commission appears to be autonomous, with a statutory directive stating it is “supervisory and shall have sole responsibility for the powers, duties, operations, and responsibilities” assigned to it by statute.<sup>95</sup>

## States Comparable to North Carolina in Size and Population Density

### Kentucky

#### Prosecution

*Prosecutors in Kentucky are part of the executive branch of state government and, although independently elected, are under the authority of the attorney general.*

There are two types of prosecutors in Kentucky.

- *Commonwealth’s Attorneys.* Sections 69 to 108 of the Kentucky Constitution define the “Executive Department.” While sections 69 to 96 concern “Officers for the State at Large,” sections 97 to 108 concern “Officers for Districts and Counties.” Section 97 provides for a “Commonwealth’s Attorney” to be elected for each judicial circuit. These prosecutors handle offenses within the jurisdiction of the circuit courts – generally, felonies. Under section 108 of the constitution, the legislature has the power, which it has not exercised, to abolish the office of commonwealth’s attorney, in which case the duties of that office would fall to the county attorneys.<sup>96</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> Office of Public Safety Budget Document, <http://dpb.virginia.gov/budget/buddoc10/pdf/partb/publicsafety.pdf>.

<sup>91</sup> Va. Code § 19.2-163.01.

<sup>92</sup> *Id.*

<sup>93</sup> Virginia Department of Planning & Budget, 2010-2012 Judicial Agencies Budget Table, <http://dpb.virginia.gov/budget/vabud/vabud.cfm?vTable=O&vBiennium=2010-2012&vSecretary=Judic&vSort=N>.

<sup>94</sup> Va. Code § 19.2-163.02.

<sup>95</sup> Va. Code § 19.2-163.01.

<sup>96</sup> Ky. Const. §§ 69-108.

- *County Attorneys.* Section 99 of the state constitution provides for the election of a “County Attorney” in each county.<sup>97</sup> County attorneys handle district court cases, including misdemeanors, juvenile cases, and preliminary proceedings in felony cases.<sup>98</sup> They also handle a variety of civil matters on behalf of their counties.

The statutory provisions regarding Kentucky’s prosecutors are contained in Chapter 15 of the Kentucky Statutes, “Department of Law,” which is a part of Title III, “Executive Branch.” The statutes provide for a system of prosecution that is unified under the control of the attorney general to an extent that is not common elsewhere. Under Ky. Rev. Stat. § 15.700, “a unified and integrated prosecutor system is . . . established with the Attorney General as chief prosecutor of the Commonwealth.” The attorney general chairs the Prosecutors Advisory Council,<sup>99</sup> which provides continuing education and other assistance to prosecutors and is responsible for “the preparation of the budget of the unified prosecutorial system.”<sup>100</sup> Funds allocated by the legislature for prosecutors are disbursed to the Prosecutors Advisory Council, which administers those funds to the prosecutors’ offices. The Council also provides human resources, purchasing, and other support services.<sup>101</sup> The state pays the salaries and expenses of both types of prosecutors (commonwealth and county) and the prosecutors’ staffs, though counties are permitted to contribute if desired and are responsible for expenses incurred in connection with certain civil law responsibilities that are allocated to the county attorneys.<sup>102</sup> Kentucky spends approximately \$38 million per year on commonwealth’s attorneys and \$32 million per year on county attorneys.<sup>103</sup>

## Defense

*Kentucky provides indigent defense services primarily through the Department of Public Advocacy, an “independent agency of state government” in the judicial branch.*

The Department of Public Advocacy was created by Chapter 31, “Department of Public Advocacy,” of Title IV, “Judicial Branch,” of the Kentucky Statutes “as an independent agency of state government, attached for administrative purposes to the Justice and Public Safety Cabinet.”<sup>104</sup> Generally, there is a commission that nominates candidates for the head of the department; the governor chooses one of the candidates; and the head of the department then hires additional staff as needed.<sup>105</sup> Larger counties must have public defender offices, while smaller counties may choose between having a public

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<sup>97</sup> Ky. Const. § 99.

<sup>98</sup> Kentucky Office of State Budget Director, 2010-2012 Operating Budget, page 38, *available at* <http://www.osbd.ky.gov/NR/rdonlyres/4C8577D6-9974-490F-8748-C06CEAC64E45/0/1012BOCVolumeI.pdf>. See also Ky. Rev. Stat. § 15.725 (stating the duties of the Commonwealth’s attorneys and county attorneys).

<sup>99</sup> Prosecutors Advisory Council Website, <http://ag.ky.gov/criminal/pac/>.

<sup>100</sup> Ky. Rev. Stat. § 15.705. The attorney general is specifically tasked with providing continuing education to the state’s prosecutors, which they must complete. Ky. Rev. Stat. § 15.718.

<sup>101</sup> Telephone conversation with Gina Carey, Executive Advisor, Prosecutors Advisory Council (Mar. 20, 2012). The Council has two HR staffers for approximately 1,150 prosecutorial personnel.

<sup>102</sup> Ky. Rev. Stat. §§ 15.750, 15.755, 15.765, 15.770.

<sup>103</sup> Kentucky Office of State Budget Director, 2010-2012 Operating Budget, pages 35-38, *available at* <http://www.osbd.ky.gov/NR/rdonlyres/4C8577D6-9974-490F-8748-C06CEAC64E45/0/1012BOCVolumeI.pdf>.

<sup>104</sup> Ky. Rev. Stat. § 31.010. See also Kentucky Department of Public Advocacy Website, <http://dpa.ky.gov/>.

<sup>105</sup> Ky. Rev. Stat. §§ 31.015 – 31.030.

defender office and having a contract system, subject to the department's approval.<sup>106</sup> The costs of indigent defense are shared to some extent between the state and the counties. The state spends approximately \$44 million per year on the department.<sup>107</sup>

## **Michigan**

### **Prosecution**

*Prosecutors in Michigan are local rather than state officials. However, there is a small state agency that coordinates, and provides training and technical assistance to, Michigan prosecutors. That agency is an "autonomous entity in the department of attorney general," and so falls within the executive branch.*

Article VII of the Michigan Constitution is entitled "Local Government," and section 4 of that article provides that "[t]here shall be elected for four-year terms in each organized county a . . . prosecuting attorney, whose duties and powers shall be provided by law."<sup>108</sup> Prosecutors are not mentioned in article V, "Executive Branch," or article VI, "Judicial Branch."

Chapter 49 of the Michigan Compiled Laws is entitled "Prosecuting Attorneys." "The prosecuting attorneys shall, in their respective counties, appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested."<sup>109</sup> State law gives the county the power to set the salary of the prosecuting attorney,<sup>110</sup> allows the county to authorize any number of assistant prosecutors, investigators, and the like,<sup>111</sup> and allows the county authorities to set the salaries of those additional personnel.<sup>112</sup> Counties also provide administrative support such as human resources and information technology services to prosecutors.<sup>113</sup>

There is an "office of prosecuting attorneys coordination," which is an "autonomous entity in the department of attorney general."<sup>114</sup> (The attorney general is part of the executive branch of state government, under article V, section 3 of the Michigan Constitution.) The office is autonomous in the sense that it prepares and submits its own budget requests, separate and apart from the attorney general, and is not directly supervised by the attorney general.<sup>115</sup> The office is controlled by a council comprised of the attorney general or his designee, the president of the Michigan Prosecuting Attorneys

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<sup>106</sup> Ky. Rev. Stat. §§ 31.060, 31.065.

<sup>107</sup> Kentucky Office of State Budget Director, 2010-2012 Operating Budget, pages 264-65, *available at* <http://www.osbd.ky.gov/NR/rdonlyres/4C8577D6-9974-490F-8748-C06CEAC64E45/0/1012BOCVolumeI.pdf>.

<sup>108</sup> Mich. Const. art. VII, § 4.

<sup>109</sup> Mich. Comp. Laws § 49.153.

<sup>110</sup> Mich. Comp. Laws § 49.159.

<sup>111</sup> Mich. Comp. Laws § 49.31.

<sup>112</sup> Mich. Comp. Laws § 49.34.

<sup>113</sup> Telephone conversation with Tom Robertson, Executive Secretary, Prosecuting Attorneys Coordinating Council (Mar. 20, 2012).

<sup>114</sup> Mich. Comp. Laws § 49.103.

<sup>115</sup> Telephone conversation with Robertson, *supra* note 113.

Association,<sup>116</sup> and three prosecuting attorneys who must be from counties of varied sizes.<sup>117</sup> It is run on a day to day basis by an executive secretary, who is appointed by the council,<sup>118</sup> and provides services such as continuing education, legal updates, and legal research assistance.

The governor's recommended budget for 2012 shows a budget of approximately \$1.9 million for the Prosecuting Attorneys Coordinating Council.<sup>119</sup> There appears to be no state funding of the prosecuting attorneys themselves.

## Defense

*Indigent defense in Michigan is funded and provided entirely at the county level. Each county provides counsel differently, whether through a public defender office, an appointment system, or a contract system. This patchwork approach has been criticized and may soon be reformed.*

Indigent defense in Michigan is funded and provided almost entirely at the county level. There is no state funding, training, or supervision of indigent defense services at the trial level, though there is a State Appellate Defender Office that handles indigent defendants' appeals.<sup>120</sup> Different counties provide indigent defense services in different ways: a few have public defender offices, others appoint attorneys and pay them hourly, and others have flat fee contracts. This patchwork "system" of indigent defense was the subject of a very critical 2008 report by the National Legal Aid and Defender Association, a study requested jointly by the Michigan legislature and the state bar.<sup>121</sup> The governor has just convened an advisory committee to recommend changes to the indigent defense system; recommendations are due by July 15, 2012.<sup>122</sup>

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<sup>116</sup> Michigan Prosecuting Attorneys Association Website, <http://www.michiganprosecutor.org>. The website describes the Association as a "voluntary association of the 83 county prosecutors, the Attorney General, and the U.S. Attorneys serving in Michigan."

<sup>117</sup> Mich. Comp. Laws § 49.104. See also Prosecuting Attorneys Coordinating Council Website, <http://www.michiganprosecutor.org/PACC.htm>.

<sup>118</sup> Mich. Comp. Laws § 49.103.

<sup>119</sup> 2012-2013 Executive Budget, page B-5, available at [http://www.michigan.gov/documents/budget/1\\_345974\\_7.pdf](http://www.michigan.gov/documents/budget/1_345974_7.pdf).

<sup>120</sup> Michigan State Appellate Defender Office Website, <http://www.sado.org/>.

<sup>121</sup> National Legal Aid & Defender Association, *A Race to the Bottom, Speed & Savings over Due Process: A Constitutional Crisis* (June 2008), available at [http://www.mynlada.org/michigan/michigan\\_report.pdf](http://www.mynlada.org/michigan/michigan_report.pdf). Another recent critical report is here: American Civil Liberties Union, *Faces of Failing Public Defense Systems: Portraits of Michigan's Constitutional Crisis* (Apr. 2011), available at [http://www.aclu.org/files/assets/MI\\_failedjustice\\_bookletsm.pdf](http://www.aclu.org/files/assets/MI_failedjustice_bookletsm.pdf).

<sup>122</sup> Editorial, *Why Michigan's indigent defense system must be reformed*, Grand Rapids Press, Dec. 4, 2011, [http://www.mlive.com/opinion/grand-rapids/index.ssf/2011/12/why\\_michigans\\_indigent\\_defense.html](http://www.mlive.com/opinion/grand-rapids/index.ssf/2011/12/why_michigans_indigent_defense.html).



## Minnesota

### Prosecution

*Prosecutors in Minnesota are county officials, not state officials. They are paid by their county boards, subject to certain constraints.*

Prosecutors are not mentioned in the Minnesota Constitution.<sup>123</sup>

The title of the Minnesota Statutes headed “Counties, County Officers, Regional Authorities” includes Chapter 388, “County Attorney.” The county attorney is the principal prosecutor in Minnesota, and is responsible for prosecuting all felony cases as well as certain other criminal cases, and for handling some non-criminal cases.<sup>124</sup> Some low-level offenses are prosecuted by city attorneys, or by private lawyers pursuant to a contract with a city.<sup>125</sup> Counties may also contract with private lawyers to prosecute misdemeanors.<sup>126</sup>

The salaries of elected county attorneys are determined by the county board, subject to statutory minimums in certain smaller counties and with the prosecutor having the right to appeal to a judge if he or she believes that the board’s actions were “arbitrary, capricious, oppressive, or in unreasonable disregard for the responsibilities and duties of said office, and the county attorney’s experience, qualifications, and performance.”<sup>127</sup> The salaries of assistant prosecutors are also determined and paid by the county.<sup>128</sup> Further, the county provides administrative support such as human resources and information technology to the county attorney.<sup>129</sup>

Minnesota’s statutes provide for a County Attorneys Council, comprised of the 87 elected county attorneys and the attorney general. Its board of governors is authorized to hire an executive director, who in turn may hire appropriate staff to provide training, legal updates, and technical assistance to the prosecutors of the state.<sup>130</sup> However, the state legislature has ceased funding the Council.<sup>131</sup> Its function has been assumed by an organization called the Minnesota County Attorneys Association, which describes itself as a non-profit, “independent, voluntary organization of County Attorneys.”<sup>132</sup> The

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<sup>123</sup> Minn. Const., available at <http://www.house.leg.state.mn.us/cco/rules/mncon/mncon.htm>.

<sup>124</sup> Minn. Stat. § 388.051.

<sup>125</sup> Telephone conversation with John Kingrey, Executive Director, Minnesota County Attorneys Association, (Mar. 20, 2012).

<sup>126</sup> Minn. Stat. § 388.09.

<sup>127</sup> Minn. Stat. §§ 388.18, 388.22.

<sup>128</sup> Minn. Stat. § 388.10.

<sup>129</sup> Telephone conversation with Kingrey, *supra* note 125.

<sup>130</sup> Minn. Stat. §§ 388.19-20.

<sup>131</sup> Telephone conversation with Kingrey, *supra* note 125.

<sup>132</sup> Minnesota County Attorneys Association Website, <http://www.mcaa-mn.org/default.aspx>. According to a history of the Association, the Council is a “semi-state agency” while the Association is a private non-profit, but at least at one time the two organizations “met at the same time and had the same officers.” William Jeronimus, *Evolution of the Minnesota County Attorney’s Association*, <http://www.mcaa-mn.org/docs/2007/Evolution.pdf>. The Council now appears to exist in name only.



Association is funded in part by dues paid by the county attorneys, in part from grants and contracts, and in part from the sales of legal forms and other products.<sup>133</sup>

## Defense

*Minnesota has a state-wide public defender system. The State Board of Public Defense is an independent agency in the judicial branch.*

Chapter 611 of the Minnesota Statutes, “Rights of Accused,” includes provisions concerning the state’s public defender system.<sup>134</sup> The statutes provide for a “State Board of Public Defense,”<sup>135</sup> which “is a part of, but is not subject to the administrative control of, the judicial branch of government.”<sup>136</sup> The board selects the state public defender,<sup>137</sup> sets his or her salary within statutory limits,<sup>138</sup> and appoints chief public defenders for each of the state’s judicial districts.<sup>139</sup> The board also prepares and submits budget requests to the state legislature.<sup>140</sup> The state generally pays for the public defender system, subject to certain caveats.<sup>141</sup> The state appropriates approximately \$65 million per year to pay for the system, which includes an administrative office.<sup>142</sup> The public defenders represent 85 percent of all defendants in Minnesota charged with “serious” crimes, and 90 percent of all juvenile defendants.<sup>143</sup>

## Missouri Prosecution

*Missouri’s prosecutors are county officials, elected and funded at the county level. They are not part of any of the branches of state government.*

Missouri’s constitution mentions the prosecution function generally but does not set out in detail the structure through which prosecution services shall be provided. The state’s statutes, however, do address the issue. Title VI of the Missouri Statutes is entitled “County, Township and Political Subdivision Government.” Chapter 56, which is located in that title, is entitled “Circuit and Prosecuting Attorneys and County Counselors.” The statutes provide for a prosecuting attorney for each county; the prosecutor must “commence and prosecute all civil and criminal actions in the prosecuting attorney’s

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<sup>133</sup> Telephone conversation with Kingrey, *supra* note 125.

<sup>134</sup> Minn. Stat. § 611.14 et seq.

<sup>135</sup> Minn. Stat. § 611.215. *See also* Minnesota Board of Public Defense Website, <http://www.pubdef.state.mn.us/>.

<sup>136</sup> Accordingly, public defenders generally are “are state employees in the judicial branch.” Minn. Stat. § 611.265.

<sup>137</sup> Minn. Stat. § 611.23.

<sup>138</sup> Minn. Stat. § 15A.083.

<sup>139</sup> Minn. Stat. § 611.26.

<sup>140</sup> Minn. Stat. § 611.215.

<sup>141</sup> Minn. Stat. § 611.27. *See also* Minnesota Management & Budget, 2012-2013 Public Defense Board Biennial Budget, available at <http://www.mmb.state.mn.us/doc/budget/narratives/gov11/pub-defense.pdf>. The state budget reflects that the system is funded almost exclusively by the state, with tiny fractions coming from grants and from the federal government.

<sup>142</sup> Public Defense Board Biennial Budget, *supra* note 141, <http://www.mmb.state.mn.us/doc/budget/narratives/gov11/pub-defense.pdf>.

<sup>143</sup> *Id.*

county in which the county or state is concerned,”<sup>144</sup> among other duties.<sup>145</sup> Elected prosecuting attorneys, their assistants, and any support personnel are paid entirely by their counties,<sup>146</sup> and are county employees.<sup>147</sup> The state sets the salary of the elected prosecuting attorney,<sup>148</sup> which is generally uniform across the state. The number and salaries of any assistant prosecutors and support staff is dependent entirely on the will of the county commissioners, to whom the elected prosecuting attorney submits a budget proposal each year. The county likewise provides human resources, information technology, purchasing, and other support functions.<sup>149</sup>

Missouri prosecutors are neither part of, nor under the authority of, any branch of state government. However, state law provides for the Missouri Office of Prosecution Services<sup>150</sup> which is an “autonomous entity in the . . . attorney general’s office.”<sup>151</sup> The office provides education, training, and technical and research assistance to prosecutors in the state. It is funded by a one-dollar court cost in all criminal cases,<sup>152</sup> as well as legislative appropriations, grants, and other revenue streams.<sup>153</sup> The head of the office is appointed by the Prosecutors Coordinators Training Council, which is essentially a state agency mirroring the composition of the “Missouri Prosecuting Attorneys Association,”<sup>154</sup> plus the attorney general or his designee.<sup>155</sup>

## Defense

*Indigent defense in Missouri is state-funded and is organized under the Office of the State Public Defender, an “independent department of the judicial branch.”*

Title XXXVIII of the Missouri Statutes is entitled “Crime and Punishment; Peace Officers and Public Defenders.” Chapter 600, located in that title, is entitled “Public Defenders.” It provides for an Office of the State Public Defender, which is an “independent department of the judicial branch of state government.”<sup>156</sup> It also provides for a Public Defender Commission, which selects the head public defender for the state, assists with developing and submitting a budget request, and performs other duties.<sup>157</sup> In fiscal year 2011, the Missouri State Public Defender had a state appropriation of \$37.8

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<sup>144</sup> Mo. Rev. Stat. § 56.060.

<sup>145</sup> Larger counties often have a separate lawyer to handle civil matters, leaving prosecuting attorneys to criminal work exclusively. Telephone conversation with Jason Lamb, Executive Director, Missouri Office of Prosecution Services (Mar. 21, 2012).

<sup>146</sup> Mo. Rev. Stat. § 56.060-56.265.

<sup>147</sup> Telephone conversation with Lamb, *supra* note 145. See also <http://www.stlouiscopa.com/Press.aspx?ID=208> (prosecutor states that Missouri prosecutors receive no state funding).

<sup>148</sup> Mo. Rev. Stat. § 56.265.

<sup>149</sup> Telephone conversation with Lamb, *supra* note 145.

<sup>150</sup> Missouri Office of Prosecution Services Website, <http://mops.mo.gov/index.htm>.

<sup>151</sup> Mo. Rev. Stat. § 56.750.

<sup>152</sup> Mo. Rev. Stat. § 56.765.

<sup>153</sup> Telephone conversation with Lamb, *supra* note 145.

<sup>154</sup> Apparently now called the Missouri Association of Prosecuting Attorneys. Association Website, <http://mops.mo.gov/mapa.htm>.

<sup>155</sup> Mo. Rev. Stat. § 56.760.

<sup>156</sup> Mo. Rev. Stat. § 600.019.

<sup>157</sup> Mo. Rev. Stat. §§ 600.015, 600.017

million.<sup>158</sup> Some defender offices receive local support for non-salary expenses such as office space and supplies.<sup>159</sup> The public defender system provides indigent criminal defense directly in all cases except those in which a conflict of interest exists.<sup>160</sup> In conflict cases, the system provides for private appointed counsel.<sup>161</sup> However, apparent underfunding of the state's indigent defense system has resulted in litigation and in some offices turning away clients.<sup>162</sup>

## Washington Prosecution

*Washington prosecutors are fundamentally county officials, although the state pays a portion of the elected prosecutors' salaries.*

Article XI of the Washington Constitution is entitled "County, City, and Township Organization." Section 5 of that article provides in part that "[t]he legislature . . . shall provide for the election in the several counties of . . . prosecuting attorneys and other . . . officers . . . and shall prescribe their duties, and fix their terms of office . . . [and it] shall regulate the compensation of all such officers . . . [though] it may delegate to the legislative authority of the counties the right to prescribe the salaries of its own members and the salaries of other county officers." Prosecutors are not discussed in article III, "The Executive," or article IV, "The Judiciary."

Title 36 of the Washington Code is entitled "Counties." Chapter 36.27 is entitled "Prosecuting attorneys." The duties of Washington prosecutors, as described in that chapter, are very broad. For example, they serve as "legal adviser to all county and precinct officers and school directors in all matters relating to their official business,"<sup>163</sup> and represent the state and the county in a range of civil and criminal matters. Prosecutors are county officials: the prosecutor's office must be at the county seat,<sup>164</sup> and when deputy prosecutors are appointed, a notice must be filed with the county auditor.<sup>165</sup> However, because prosecutors also represent the state, under Wash. Rev. Code § 36.17.020, compensation for the elected prosecuting attorney is divided between the state and the county. The state is required to contribute "one-half the salary of a superior court judge" and the county must contribute "an amount that equals or exceeds that contributed by the county in 2008."<sup>166</sup> The county

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<sup>158</sup> Office of Administration, Office of the State Public Defender Financial Summary, *available at* <http://oa.mo.gov/bp/budg2012/PublicDefender.pdf>.

<sup>159</sup> Telephone conversation with Lamb, *supra* note 145.

<sup>160</sup> History of the Missouri State Public Defender, <http://www.publicdefender.mo.gov/about/history.htm>.

<sup>161</sup> Telephone conversation with Lamb, *supra* note 145.

<sup>162</sup> Jon Mosher, *Missouri's chronic right to counsel problems revisited*, National Legal Aid & Defender Association, Feb. 9, 2011, <http://www.nlada.net/jseri/blog/missouri%E2%80%99s-chronic-right-counsel-problems-revisited>; Missouri Public Defender Commission, 2011 Annual Report (Oct. 2011), *available at* <http://publicdefender.mo.gov/about/FY2011AnnualReport.pdf> (noting ongoing litigation and the fact that some defender offices have been permitted to turn away cases due to lack of resources).

<sup>163</sup> Wash. Rev. Code § 36.27.020(2).

<sup>164</sup> Wash. Rev. Code § 36.27.070.

<sup>165</sup> Wash. Rev. Code § 36.27.040.

<sup>166</sup> Wash. Rev. Code § 36.17.020(11).

pays for all assistant prosecutors, support staff, and overhead expenses, meaning that the vast majority of the cost of prosecution is borne by the county.<sup>167</sup>

Other than providing some funding, the state does little to support or to control prosecutors. There is an organization called the Washington Association of Prosecuting Attorneys. It is not a state agency, but rather is “a non-partisan, non-profit service organization dedicated to the training and support of county prosecutors” that “serves as a spokesman for county prosecutors at the state and national levels and acts as a liaison between counties and other levels of government through research, training and lobbying.”<sup>168</sup> It is funded in part by dues paid by counties, and in part through grants and contracts.<sup>169</sup>

## Defense

*Indigent defense in Washington is provided by cities and counties, though the state provides supplemental funding to those cities and counties that meet standards established by a state indigent defense agency, which is located in the judicial branch.*

In Washington, cities and counties are responsible for providing indigent defense services. According to statute, “[e]ach county or city . . . shall adopt standards for the delivery of public defense services, whether those services are provided by contract, assigned counsel, or a public defender office.”<sup>170</sup> The bulk of this responsibility falls on counties, but cities may choose to assume responsibility for prosecuting misdemeanors that are committed within city limits, and if they do so, they may also bear responsibility for providing indigent defense services in such cases.

The state provides some assistance to local governments in meeting this obligation. Cities and counties that meet certain standards may receive state funding through the office of public defense, which is “an independent agency of the judicial branch.”<sup>171</sup> The office is run by a director, who is appointed by the supreme court. The office submits its own budget requests and administers its own budget. Its job is not to represent clients, but rather to “[a]dminister all state-funded services” in indigent criminal defense and certain other areas of representation.<sup>172</sup> To do so, the office sets standards for city and county indigent defense systems and awards funding to those local governments that meet the standards.<sup>173</sup> According to the state budget, about \$50 million per biennium, or \$25 million per year, is allocated to the office.<sup>174</sup> It is estimated that the state bears about 5% of the cost of indigent defense in the trial courts, with cities and counties paying the balance.<sup>175</sup>

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<sup>167</sup> Telephone conversation with Tom McBride, Executive Secretary, Washington Association of Prosecuting Attorneys (Mar. 20, 2012).

<sup>168</sup> Washington Association of Prosecuting Attorneys Website, <http://www.waprosecutors.org/>.

<sup>169</sup> Telephone conversation with McBride, *supra* note 167.

<sup>170</sup> Wash. Rev. Code § 10.101.030.

<sup>171</sup> Wash. Rev. Code § 2.70.005.

<sup>172</sup> Wash. Rev. Code § 2.70.020.

<sup>173</sup> Wash. Rev. Code §§ 10.101.050 – 10.101.080.

<sup>174</sup> Senate Ways & Means Committee, 2011-13 Operating Budget, page 27, *available at* <http://leap.leg.wa.gov/leap/Budget/Detail/2011/SOAgencyDetail0603.pdf>.

<sup>175</sup> Telephone conversation with McBride, *supra* note 167.